MOTION FILED

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No. 95-1516

In the Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY,

Petitioner

v.

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY AND MELINDA HERRENSMITH, INDIVIDUALLY, AS MOTHER OF TROY E. CILONE, INFANT, AND AS ADMINISTRATRIX OF THE ESTATE OF TROY E. CILONE, DECEASED,

Respondents

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus* respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the failure of respondents to consent to filing.[1]

Amicus Product Liability Advisory Council, Inc. ("PLAC"), is an association of manufacturing companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. PLAC's members, together with other corporations doing business in this country, have borne the brunt of the massive increase in punitive damages verdicts that have occurred over the past two decades. See generally *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting). PLAC and its members therefore have a particular interest in

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[1] Respondents' counsel indicated that he would not consent to the filing unless *amicus* disclosed in its brief (1) whether Ford Motor Co. is a member of the Product Liability Advisory Council, Inc. ("PLAC"); (2) "[t]he amount that Ford Motor Company or any related entity contributes to the Product Liability Advisory Council, Inc. on a yearly basis and what percentage the amount contributed bears to the total contributions of the organization"; and (3) whether the Ford Motor Co. requested or solicited the filing of PLAC's brief in this case. (The letter containing these demands has been filed with the Clerk of the Court.) While PLAC routinely discloses its corporate membership when making court filings — a list of PLAC's membership is appended to its brief in this case — respondent otherwise has demanded the release of PLAC's internal, confidential information as a condition of its consent.

the development of rules that will assure fundamental fairness in the procedures used to award such damages.

Because *amicus* and its members have a compelling interest in the issues presented in the petition in this case — and because they have experience in the operation of punitive damages regimes used by States across the Nation — they seek leave to file this brief to assist the Court in its consideration of the petition for certiorari in this case.

Respectfully submitted,

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Whether the Due Process Clause of the Fourteenth Amendment permits the use of jury instructions that offer the jury no meaningful guidance in setting the amount of punitive damages, in a jurisdiction where judicial review of punitive damages verdicts is substantially more deferential than that considered in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991).

2. Whether, in States where juries are given no meaningful guidance in setting the amount of punitive damages and in which judicial review of punitive verdicts is highly deferential, the Due Process Clause of the Fourteenth Amendment requires proof of a punitive damages claim by clear and convincing evidence.

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BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the *amicus* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

This Court should grant review to determine whether it is consistent with the Due Process Clause for a State to permit the award of punitive damages where the jury instructions provide no meaningful guidance as to the amount of any award, and where the State also provides for only the most deferential judicial review of the size of punitive verdicts. The pattern instructions in at least 15 States tell the jury no more than that punitive damages are designed to punish and deter; jurors are not so much as given a list of considerations that may be relevant to setting an amount that will accomplish those purposes. Yet there can be no doubt that such vague and fundamentally contentless instructions — when given to jurors who have no experience in imposing punishment and who lack the information and experience needed to place the defendant's actions in context with other judicial punishments — encourage inconsistent, unpredictable, and often excessive judgments. At the same time, highly deferential, after-the-fact judicial review is not a complete corrective for this problem. Such a regime starts with inflated awards returned by unconstrained juries. The imperative of judicial deference then means that excessive judgments often will survive, and at a minimum it imposes an inexorable hydraulic pressure to increase (and inevitably to overstate) the punishment imposed upon punitive damages defendants.

Review also is appropriate to determine whether a claim for punitive damages must be proved by clear and convincing evidence when the State does not provide the procedural and

substantive protections considered by the Court in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). That issue was left open in *Haslip*. See *id.* at 23 n.11. It should be resolved now. A majority of the States have recognized that use of a clear and convincing evidence standard is essential to the preservation of fundamental fairness. And surely, in a State that makes use of procedures less rigorous than those before the Court in *Haslip* — and in which enormous awards accordingly are returned by juries with some regularity — it is particularly important that liability for punitive damages be clearly established.

ARGUMENT

This case presents two recurring issues of enormous importance that have remained unresolved following this Court's decision in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). In that case, the Court upheld a procedural regime for the award of punitive damages that had three components. First, the jury, while given wide discretion in choosing a punitive award, was both instructed as to the purposes of punitive damages and told that in fixing the amount of any punitive verdict it was to "'take into consideration the character and the degree of the wrong as shown by the evidence and the necessity of preventing similar wrong.'" *Id.* at 6 n.1 (citation omitted). Second, the amount of any punitive judgment was scrutinized by the trial court in light of a detailed list of considerations relevant to setting an appropriate punishment. *Id.* at 20. And third, the Alabama Supreme Court "provide[d] an additional check on the jury's or trial court's discretion" by "undertak[ing] a comparative analysis" and then applying "detailed substantive standards it has developed for evaluating punitive awards." *Id.* at 20-21. The Court found that this "full panoply of Alabama's

procedural protections" accords due process to defendants in punitive damages cases. *Id.* at 23.[1]

The Court, however, did not decide whether a procedural system for the award of punitive damages is constitutional where one or more elements of this "full panoply" are missing. That issue is squarely presented here. In Kentucky at the time that this case was decided — and in many other States still today — the jury instructions concerning the amount of punitive damages provided *less* guidance than those in *Haslip*, while neither of the other *Haslip* procedural protections were available. We submit that review to resolve the constitutionality of such a regime is essential: "many courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness — the jury itself — to be converted into a source of caprice and bias." *TXO Production Corp.* v. *Alliance Resource Corp.*, 113 S. Ct. 2711, 2742 (1993) (O'Connor, J., dissenting).

The petition in this case also presents a second important and closely related issue. In *Haslip*, the Court left open the question whether it is consistent with the Due Process Clause for a State to permit a jury to find a claim for punitive damages established by a simple preponderance of the evidence in cases where the defendant is not afforded the other "procedural and substantive protections" provided by Alabama. 499 U.S. at 23 n.11. Yet as many States have recognized, a plaintiff must be required to prove the elements of a claim for punitive damages by clear and convincing evidence if fundamental fairness is to be preserved. Whether a jury may be permitted to award punitive damages under a preponderance standard when the jury's discretion in setting

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[1] Of course, subsequent experience — including the endless stream of certiorari petitions challenging the shocking punitive judgments that are routinely affirmed by the Alabama courts — suggests that the Alabama system does not work as advertised.

the amount of such an award is essentially unconstrained accordingly warrants review.

A. The Question Whether A State May Permit Punitive Damages To Be Imposed Under Jury Instructions That Provide No Meaningful Guidance, And Then Afford Highly Deferential Judicial Excessiveness Review, Is Important And Recurring

1. The question whether juries must be given punitive damages instructions that meaningfully channel their discretion is one of great currency. While Kentucky has prospectively modified the "bare-bones" regime that was in place when this case was tried, juries in many other States are affirmatively instructed that they may exercise essentially unconstrained discretion in setting punitive awards — and they are given virtually no guidance in doing so. The pattern instructions in at least 15 States tell the jury no more than that punitive damages are designed to punish and deter; jurors are not told what considerations may be relevant to setting an amount that will accomplish those purposes, and are told of no consideration that may *not* properly govern their decisions. Perhaps typical is the instruction in Georgia, where juries are told only that "[t]he measure of [punitive] damages is your enlightened conscience." Georgia Suggested Pattern Jury Instructions, No. 13 (1984).[2] Such instructions are

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[2] States that similarly fail to identify either permissible or impermissible considerations for the jury include Arkansas (Arkansas Model Jury Instructions, Civil (1989)); Colorado (Colorado Jury Instructions, Civil, No. 5.3A (3d ed. 1990)); Idaho (Idaho Jury Instructions, Nos. 921-1, 921-2 (1988)); Illinois (Illinois Pattern Jury Instructions, Civil, No. 35.01 (3d ed., 1990)); Indiana (I Indiana Pattern Jury Instructions, Civil, No. 111.100 (2d ed. 1989)); Missouri (Missouri Approved Jury Instructions, Nos. 10.01, 10.02 (3d ed. 1989)); Montana (Montana Pattern Jury Instructions, Civil, Nos. 25.60A-25.65 (1987)); New Jersey (Model

considerably more harmful even than the "amorphous" charge in *Haslip* (499 U.S. at 48, O'Connor, J., dissenting)), which at least informed the jury that it was obligated to "'take into consideration the character and degree of the wrong as shown by the evidence.'" *Id.* at 19 (citation omitted). If the jurors' "enlightened consciences" tell them that blacks should be punished more than whites, or corporations more than individuals, or foreign citizens more than local ones, these instructions endorse such decision-making. In addition, another nine States make use of jury charges that do not differ materially from the one applied in Alabama; these States offer the jury a handful of relevant considerations and leave it to the jurors to determine how these considerations should be weighed and applied.[3]

Jury Charges, Civil, No. 6.40 (2d ed. 1983)); New York (New York Pattern Jury Instructions — Civil, No. 2.278 (2d ed. 1990)); North Carolina (North Carolina Pattern Jury Instructions for Civil Cases, Nos. 810.00, 810.01 (1986)); North Dakota (North Dakota Pattern Jury Instructions, Civil, Nos. 1260, 1265 (1986)); Oklahoma (6 Vernon's Oklahoma Forms, §§ 7627-7631 (1990)); Virginia (Instructions for Virginia and West Virginia, §§ 26-128, 26-129, 26-130 (3d ed. 1990)); Wyoming (Wyoming Civil Pattern Jury Instructions, No. 4.06 (rev. ed. 1988)).

[3] Alaska Pattern Jury Instructions, No. 20.20 (1990); Recommended Arizona Jury Instructions (Civil), No. 10C (1990) (list of considerations optional); Florida Standard Jury Instructions and Civil Cases, No. 6.12 (1989); Iowa Uniform Jury Instructions Annotated, Civil, No. 3.28 (1990); Maine Manual of Jury Procedures and Instructions, No. 352 (1990); Mississippi Model Jury Instructions, No. 20.10 (1977); Nevada Pattern Jury Instructions, Civil, Nos. 10.20, 10.21 (1986); Pennsylvania Suggested Civil Jury Instructions, Nos. 14.00, 14.02 (1984); South Carolina Recommended Civil Jury Charges, Nos. 14.01, 14.04 (1989); II Wisconsin Civil Jury Instructions, Civil, No. 1707 (1990).

2. There can be no doubt that such vague and fundamentally contentless instructions "encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections" in setting punitive awards. *Haslip*, 499 U.S. at 43 (O'Connor, J., dissenting). Members of the Court repeatedly have expressed concern that this "lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict." *TXO*, 113 S. Ct. at 2729 (O'Connor, J., dissenting). See *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring in the judgment); *Smith* v. *Wade*, 461 U.S. 30, 88 (1983) (Rehnquist, J., dissenting). As Justice Brennan observed, "[g]uidance like this is scarcely better than no guidance at all. * * * [P]unitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (Brennan, J., concurring).

The danger posed by such instructions is manifest. Even in the best of circumstances, juries need considerable guidance to perform their tasks satisfactorily. As the leading scholars of the subject have observed,

> [a] jury is composed of untrained citizens, drawn randomly from the eligible population, convened briefly for a particular trial, entrusted with great official powers, permitted to deliberate in secret, to render a verdict without explanation, and, without any accountability then or ever, to return to private life.

M. Saks, *Jury Verdicts: The Role of Group Size and Social Decision* 6 (1977). Students of the jury thus have found that juries sometimes "consider[] extralegal factors in determining liability and punitive awards" (M. Selvin & L. Picus, *The Debate Over Jury Performance: Observations From a Recent Asbestos Case* ix (1987)), while it seems clear from the work of social scientists that juries "are occasionally biased against corporate defendants." Greene, *On Juries and Damage*

Awards: The Process of Decisionmaking, 52 Law & Contemp. Probs. 224, 246 (1989).[4] And vague punitive damages instructions unnecessarily and unjustifiably *invite* jurors to consider extralegal considerations by failing to tell them what factors may or may not be considered.

Moreover, even the best-intentioned jury, as Blackstone (himself a great defender of the institution) observed more than two centuries ago, may return an incorrect verdict because of "inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes." 3 W. Blackstone, *Commentaries on the Laws of England* 389 (1768). After all, "[t]here is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental." G. Williams, *The Proof of Guilt* 272 (3d ed. 1963). It thus is inarguable that juries' decisions "can be shaped by influences impermissible in our system of justice. In fact, they are more susceptible to such influences than judges." *TXO*, 113 S. Ct. at 2728 (O'Connor, J., dissenting). This makes it essential to provide meaningful guidance to the jury.

3. The likelihood of juror error that exists in all cases is greatly increased by the nature of the question posed to the jury when punitive damages are at issue. While juries are thought to be especially effective in making factual determinations that are within the common experience of lay men and women, "determining the amount of punitive damages smells more like sentencing than fact-finding. It does not require answering a 'what happened' question.

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[4] See A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 42-45 (1985) (in personal injury trials, corporate and governmental defendants more likely to be found liable and to be required to pay larger damages); Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Human Behavior 151 (1989) (same).

Rather, it embodies the question, 'what ought to happen' to the defendant, an issue typically committed to the judge, not the jury, in a criminal case." Ellis, *Punitive Damages, Due Process and the Jury*, 40 Ala. L. Rev. 975, 1004 (1989).

Indeed, as this Court has noted, "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties * * * . These are the kinds of calculations traditionally performed by judges." *Tull* v. *United States*, 481 U.S. 412, 427 (1987). "Determining a fair penalty and one that will likely bring about an appropriate level of deterrence, neither too much nor too little, does not invoke a familiarity with what the Court called in *Railroad Co.* v. *Stout*[, 84 U.S. (17 Wall.) 657, 664 (1873),] 'the common affairs of life.' * * * Such a sanction represents an example of those 'issues . . . presented for adjudication which are far removed from commonplace activities and accidents familiar to the man on the street.'" Ellis, *supra*, 40 Ala. L. Rev. at 1006 (footnotes omitted), quoting J. Fleming, *The American Tort Process* 113 (1988).

Jurors judging a punitive damages case thus labor under a significant handicap that derives from the nature of the institution. A jury considers its case in isolation; it lacks the information and experience needed to place the particular defendant's actions in context, and typically has no knowledge of the range of punishments to which comparable wrongdoers have been subjected. A jury is therefore far less able than a judge to devise a sanction that is appropriately proportioned to the relative wrongfulness of the defendant's conduct. See Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 286 (1983); Ellis, *supra*, 40 Ala. L. Rev. at 1007. As a result, a jury will be entirely at sea — and the jury's verdict is likely to be capricious — unless the jury instructions provide truly meaningful guidance.

This is true even in those States where juries are given a brief list of considerations relevant to the selection of a

punishment. Jurors in those States are not told how to weigh the listed considerations or how to balance them against one another. And, of course, the jurors cannot be given expertise in assessing punishments and setting appropriate levels of deterrence. Thus, as one commentator has noted, "[e]ven if some factors [given to the jury as bearing on the punitive damages calculation] are questions of pure fact,"

> the calculation of punitive damages cannot be said to be fact-dependent or meaningfully guided by a standard. Multi-factor approaches to the calculation of punitive damages typically allow the decisionmaker to decide for itself the relative importance of individual factors and to consider other factors as well. The decisionmaker then makes a highly discretionary determination from a wide range of choices.

Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo. Wash. L. Rev. 723, 802 (1993). The vague instructions typically given in so many states accordingly do not serve as a meaningful and effective constraint on the jury's discretion.

4. The difficulty that a jury will have in reaching a correct decision is compounded by a feature of many punitive damages regimes that seems calculated to *induce* an unjustified decision: in many states juries are informed of the defendant's financial condition, plaintiffs' counsel urge the jury to set the punishment directly on that basis, and juries are affirmatively instructed to consider financial condition as a basis for punishment.[5] It has long been a commonplace

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[5] Indeed, in some States the defendant's wealth is the *only* consideration that is called to the jury's attention as bearing on the size of a punitive award. See Arkansas Model Jury Instructions, Civil (1989); Florida Standard Jury Instructions and Civil Cases, No. 6.12 (1988); Idaho Jury Instructions, Nos. 921-1, 921-2 (1988); Wyoming Civil Pattern Jury Instructions, No. 4.06 (rev.

that juries blinded by evidence of the size and financial condition of a wrongdoer and feeling "antipathy to a wealthy, out-of-state corporate defendant" may surrender to "redistributionist impulses." *TXO*, 113 S. Ct. at 2725-2726 (Kennedy, J., concurring in part and concurring in the judgment). This unsurprising temptation means that evidence of wealth "may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931). See Abraham & Jeffries, *supra*, 18 J. Legal Stud. at 424; Ellis, *supra*, 40 Ala. L. Rev. at 996.[6]

In *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2341 (1994), the Court accordingly noted that "the rise of large,

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ed. 1988).

[6] Courts generally have permitted consideration of wealth in the assessment of punitive damages (see *TXO*, 113 S. Ct. at 2737-2738 (O'Connor, J., dissenting)), and indeed this practice makes sense in considering what may be needed to deter an *individual* defendant from committing a punishable wrong, especially one that is not economically motivated, and in protecting any type of defendant from economically ruinous punishment. But commentators are virtually unanimous in the view that a *corporate* defendant's "wealth" has *no* rational connection to the setting of an appropriate penalty. See, *e.g.*, Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Stud. 415, 421-422 (1989); Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 Ala. L. Rev. 741, 824-826 (1989); Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 Ala. L. Rev. 1143, 1176-1177 (1989); *Symposium Discussion, Punitive Damages*, 56 S. Cal. L. Rev. 155, 190-191 (1982) (comments by Professors Jack L. Carr and Malcolm E. Wheeler). See also *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508-509 (7th Cir. 1992) (Easterbrook, J.).

interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." The Court explained that

> [p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

Id. at 2340-2341. See *TXO*, 113 S. Ct. at 2723 (plurality opinion); *id.* at 2737, 2738 (O'Connor, J., dissenting). The need for instructions that properly channel the jury's discretion therefore is manifest.

5. Common sense thus suggests that unguided juries often will return capricious and excessive awards. But we need not rely on logic to establish that proposition: empirical data demonstrate that trial and appellate judges frequently find it necessary to reduce or remit damages awarded by juries. These actions are significant because every case in which a judge finds an award excessive is one in which the instructions in fact did not succeed in keeping the jury's exercise of discretion within proper bounds.

One recent survey was described to the Court in the petitioner's brief in *Honda*, No. 93-644, at 27-28. This analysis reviewed all reported cases, state and federal, in which punitive damages awards were contested as excessive during 1992 and 1993.[7] In 141 of the 271 cases in the

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[7] The survey sample was constructed by searching the Westlaw electronic database for all cases involving punitive damages that discuss remittitur, reductions, or excessiveness. In technical terms, the search — drawn to be as inclusive as possible — was "punitive or exemplary/50 reduc! or remit! or exces! & da (>1991)." The search was conducted in Westlaw files "allstates" and "allfeds."

sample — or more than 50% — the punitive awards were reduced or set aside altogether on post-trial or appellate review.[8] These findings are consistent with the conclusions of all of the published empirical studies on the subject.[9] This

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[8] Concededly, a survey of reported decisions makes use of a sample that is to some extent biased. Reported decisions are in large measure appellate decisions, and the cases most likely to be appealed are those where the damages awards are the largest (and therefore, presumably, the most likely to be reduced). See generally Landes & Posner, *New Light on Punitive Damages*, Regulation (Sept./Oct. 1986) at 34. On the other hand, such a survey omits the large volume of cases in which awards are reduced by trial courts or are settled at a significant discount while an appeal is pending; there is reason to believe that there are a substantial number of such cases. See *Honda*, 114 S. Ct. at 2341 n.11. Whatever the precise numbers, then, the survey establishes beyond dispute that punitive verdicts returned by juries are erroneous in a great many cases. And to the extent that the survey sample is skewed towards cases involving larger punitive awards, those are, of course, the cases in which the greatest deprivations of property take place.

[9] The most oft-cited empirical study of punitive damages, which was conducted by the RAND Institute for Civil Justice, found that punitive awards were reduced or eliminated in 32 out of a sample of 68 punitive verdicts returned in two jurisdictions between 1979 and 1983. Twenty-one of the 32 awards were reduced through post-judgment settlement. Larger verdicts were much more likely to be reduced; although awards were reduced in just under 50% of all cases, awards where reductions took place "involved nearly 90 percent of the total money at stake." M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* 28 (RAND Inst. for Civil Justice 1987). The study found that "[n]early every large award received some reduction — nine of 10 cases with a punitive award greater than $50,000." *Id.* at 30. Other studies have reached similar results. See U.S. Gen. Acct. Office, Report to the Chairman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, Comm. on Energy and Commerce, House of

state of affairs plainly is unhealthy for the jury system: a regime in which jury awards routinely are set aside is sure to breed cynicism about the punitive damages process. Our argument therefore is not an attack on the jury; to the contrary, we suggest that the values that underlie the jury system are best served by providing the jury with guidance at the outset, rather than by intervening to throw out the jury's decision at the end.

6. In the face of vague jury instructions, due process is not preserved by the availability of judicial review that falls short of virtually de novo redetermination of a proper punishment. In States where the jury's discretion is wholly

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Representatives, *Product Liability, Verdicts and Case Resolution in Five States*, GAO/HRD-89-99 42 (Sept. 1989) (post-trial reductions in 82% of 23 punitive verdicts studied); Wheeler, *supra*, 69 Va. L. Rev. at 288 (of 45 appellate decisions in New York in decade before 1983 addressing punitive damages, punitive awards remitted or reversed in 35); Landes & Posner, *supra*, Regulation 35 (punitive award reversed in six of 10 federal appellate cases addressing punitive damages, and reduced in one); Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 54-56 (1992) (of 260 products liability punitive awards between 1965 and 1990, punitive awards were reversed in approximately 23%, reduced in 8.5%, and settled in 39.6%; in the 80 cases settled prior to appeal, 19 plaintiffs settled for no punitive damages and another 17 settled for a reduced award); M. Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 30-32 (Roscoe Pound Foundation 1991) (slightly more than half of products liability punitive awards reversed or adjusted downwards in 1970s and 1980s). While these studies do not, for the most part, distinguish between post-verdict decisions setting aside awards on the ground that the jury should not have imposed punitive liability at all and those decisions finding awards excessive, they clearly show that jury instructions are not serving to preclude excessive verdicts.

unconstrained — those where the instructions offer even less guidance than that provided to the jury in *Haslip* — after-the-fact judicial review is not a complete corrective. Whether or not such review can assure that verdicts are kept within the limits of substantive due process, "due process does not simply require that a particular result be substantively acceptable; it also requires that it be reached on the basis of permissible considerations." *TXO*, 113 S. Ct. at 2735 (O'Connor, J., dissenting). Cf. *Santosky* v. *Kramer*, 455 U.S. 745, 757 (1982) ("[r]etrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard"). Yet in States where juries are given no meaningful guidance at all, "courts cannot review whether a jury properly applied permissible factors, because juries are not told which factors are permissible and which are not." *Haslip*, 499 U.S. at 56 (O'Connor, J., dissenting). And surely there is something wrong with a system in which more than 50% of jury awards are set aside or modified; that figure makes plain that the first and most important part of the system for the award of punitive damages is deeply flawed.

Most fundamentally, where vague instructions are combined with judicial review that is less searching than that at issue in *Haslip*, the system cannot withstand constitutional scrutiny. Petitioner demonstrates (at Pet. 15-17) that Kentucky, like most States, provided exceedingly deferential review of the size of punitive awards, asking only whether the verdict shocks the judicial conscience. Such a regime starts with inflated awards returned by unconstrained juries; the imperative of judicial deference then means that excessive judgments often will survive, and at a minimum it imposes an inexorable hydraulic pressure to increase (and inevitably to overstate) the punishment imposed upon punitive damages defendants. It also means that capricious and inconsistent judgments — in which one defendant receives a small (or no) punishment, while an identically situated defendant is

punished massively — routinely will survive judicial review.[10] See *Haslip*, 499 U.S. at 50 (O'Connor, J., dissenting).

Such a system is fundamentally unfair. It surely would be unconstitutional for a State to make use of a regime in which punishments were set at random, with some defendants not punished at all and others punished in the amount of tens of millions of dollars. Even if judicial review reduced the largest of these awards to the greatest amount that was not excessive as a matter of substantive due process, there can be no doubt that the wholly capricious nature of the system would render the State's regime unconstitutional. Yet that is essentially what happens in many States now; unconstrained juries — unpredictably but frequently — return excessive awards, which are reviewed under a highly deferential standard. The Court should grant review to determine the constitutionality of such a system.

B. The Question Whether, In A System With Vague Jury Instructions And Highly Deferential Post-Verdict Judicial Review, Liability For Punitive Damages Must Be Established By Clear And Convincing Evidence Is Recurring And Important

The question whether, in the circumstances of cases like this one, a claim for punitive damages must be proved by clear and convincing evidence also warrants review. In *Haslip*, the Court stated that "[t]here is much to be said in

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[10] That is evident in this case, where the first jury found *for* petitioner and the second returned a *massive award against* petitioner. Such inconsistencies are commonplace in the world of punitive damages. See, *e.g.*, *BMW of North America, Inc.* v. *Gore*, Pet. Br. No. 94-896, at 9 (noting that in two virtually identical cases, one plaintiff received no punitive damages while the other was awarded $4 million, subsequently remitted on appeal to $2 million).

favor of a State's requiring, as many do, * * * a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt," before punitive damages are awarded. 499 U.S. at 23 n.11 (citations omitted). But the Court added that it was not persuaded "that the Due Process Clause requires that much. We feel that the lesser standard prevailing in Alabama — 'reasonably satisfied from the evidence' — *when buttressed, as it is, by the procedural and substantive protections outlined above*, is constitutionally sufficient." *Ibid.* (emphasis added). In Kentucky at the time that this case was decided, and in many other States today, this lesser standard is *not* buttressed by the *Haslip* protections.

Petitioner explains (at Pet. 19-26) why use of a preponderance standard in these circumstances denies the defendant due process, and we will not repeat that argument here. We add only that a majority of the States have recognized that application of a "clear and convincing evidence" standard is essential to preserve fundamental fairness. Twenty-two States have adopted this (or a more demanding) requirement by statute.[11] The highest courts of another

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[11] Ala. Code § 6-11-20(a) (1993); Alaska Stat § 09.17.020 (1994); Cal. Civ. Code § 3294(a) (West Supp. 1996); Colo. Rev. Stat. Ann. § 13-25-127(2) (West 1989) (requiring proof beyond a reasonable doubt); Ga. Code Ann. § 51-12-5.1(b) (Supp. 1995); Ill. Ann. Stat. ch. 735, para 5/2-1115.05(b) (Smith-Hurd 1996) (available on Westlaw); Ind. Code Ann § 34-4-34-2 (Burns 1986); Kan. Civ. Proc. Code Ann. § 60-3701(c) & § 60-3702(c) (Vernon Supp. 1993); Ky. Rev. Stat. Ann. § 411.184(2) (Michie 1992); Minn. Stat. Ann. § 549.20(1) (West Supp. 1996); Miss. Code Ann § 11-1-65(1)(a) (1993); Mont. Code Ann. § 27-1-221(5) (1995); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1995); N.J. Stat. Ann. § 2A:15-5.12(a) (West Supp. 1996) (available on Westlaw); N.C. Gen. Stat. § 1D-15 (1995); N.D. Cent. Code § 32-03.2-11(1) (Supp. 1995); Ohio Rev. Code Ann. § 2307.80(A) & 2315.21(C)(3) (Anderson 1991); Okla. Stat. Ann. tit. 23, § 9.1(B),

seven States have done so by means of their common-law authority.[12] These courts have explained that "punitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction" (*Masaki*, 780 P.2d at 575), and have required use of an elevated standard of proof "because of [punitive damages'] penal nature and potential for debilitating harm." *Zenobia*, 601 A.2d at 657. While these courts have invoked the common law as well as federal constitutional considerations in reaching this result, the common-law factors they have identified are equally applicable to the due process inquiry. And surely, in a State that makes use of procedures less rigorous than those before the Court in *Haslip* — and in which enormous awards accordingly are returned by juries and upheld on appeal with some regularity — it is particularly important that liability for punitive damages be clearly established.

(C), & (D) (West Supp. 1996); 1995 Or. Laws Ch. 688, S.B. No. 482 (Approved July 19, 1995) (amending Or. Rev. Stat. § 18.540(2) & § 30.925(1) (available on Westlaw); S.C. Code Ann. § 15-33-135 (Law. Co-op Supp. 1995); Tex. Civ. Prac. & Rem. Code Ann. 41.003(a) (West Supp. 1996); Utah Code Ann. § 78-18-1(1)(a) (1992). In addition, Iowa requires proof by a "preponderance of clear, convincing and satisfactory evidence" for punitive damages. *See* Iowa Code Ann. § 668A.1(1)(a).

[12] *Linthicum* v. *Nationwide Life Ins. Co.*, 723 P.2d 675, 680-81 (Ariz. 1986); *Jonathan Woodner Co.* v. *Breeden*, 665 A.2d 929, 932, 938 (D.C. 1995); *Masaki* v. *General Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989); *Tuttle* v. *Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Owens-Illinois, Inc.* v. *Zenobia*, 601 A.2d 633, 657 (Md. 1992); *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *Wangen* v. *Ford Motor Co.*, 294 N.W.2d 437, 457-458 (Wis. 1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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